

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALAN NEWMAN	:	DETERMINATION
	:	DTA NO. 820300
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Periods June 1, 1999 through November 30,	:	
1999 and March 1, 2000 through August 31, 2000.	:	

Petitioner, Alan Newman, 14 Macintosh Lane, Monsey, New York 10952, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1999 through November 30, 1999 and March 1, 2000 through August 31, 2000.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on August 16, 2005 at 10:30 A.M., with all briefs to be submitted by December 6, 2005, which date began the six-month period for the issuance of this determination. Petitioner appeared by Alan P. Licciardello, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michele W. Milavec, Esq., of counsel).

ISSUE

Whether the Division of Taxation has sustained its burden of proof to show that the imposition of fraud penalty pursuant to Tax Law § 1145(a)(2) was proper.

FINDINGS OF FACT

The Division of Taxation's proposed findings of fact have been incorporated into the Findings of Fact herein.

1. Petitioner, Alan Newman, was engaged in business in New York State under the corporate name New Gold Enterprises, Inc. during the tax periods at issue.

2. Petitioner was specifically engaged in the purchase and sale of used motor vehicles which were subject to tax under Articles 28 and 29 of the Tax Law during the tax periods at issue.

3. The Division of Taxation ("Division"), by way of its Revenue Crimes Bureau, received a fraud referral from the New York State Department of Motor Vehicles ("DMV") concerning possible sales tax evasion after receiving what it considered suspicious paperwork on transactions involving motor vehicles purchased from a Florida dealer with unusual bills of sale asserting small amounts of tax due after high trade-in values.

4. The Division, through its Revenue Crimes Bureau, and the New York State DMV conducted an investigation of petitioner and New Gold Enterprises, Inc. for alleged illegal activities, including, but not limited to, defrauding the State of New York by failing to remit sales tax collected from customers as part of various vehicle sales during the tax periods ended August 31, 1999, November 30, 1999, May 31, 2000 and August 31, 2000.

5. The Division determined that for nine separate used motor vehicle sales during the tax periods ended August 31, 1999, November 30, 1999, May 31, 2000 and August 31, 2000, petitioner failed to pay appropriate New York State sales tax on the transactions.

6. Petitioner sold used motor vehicles to individuals under the corporate name New Gold Enterprises, Inc. or Alan Newman and gave the purchasers a bill of sale under these names

reflecting the sales price, extras and sales tax actually paid by the individual. Petitioner subsequently submitted paperwork to the New York State DMV to register these vehicles for the individuals who had purchased them, including a fraudulent bill of sale from an unrelated corporation, Pinecrest Enterprises, Inc., which reflected the correct sales price of the vehicle but included a fictitious trade-in vehicle with a value that was just short of the sales price, resulting in a lower total taxable amount reported. The fraudulent bills of sale showing fictitious trade-in vehicles and the Form DTF-802, Statement of Transaction - Sale of Motor Vehicle, showing the falsely reduced sales tax due, which petitioner submitted to the DMV, were never seen by the individuals purchasing vehicles from petitioner and contained forged signatures of these individuals.

7. Petitioner used a false copy of a Florida motor vehicle dealer's license for Pinecrest Enterprises, Inc. to purchase used motor vehicles at wholesale from dealers in New York State. Petitioner was never authorized by Pinecrest Enterprises, Inc. to purchase or sell motor vehicles in New York State on behalf of Pinecrest Enterprises, Inc. All signatures on the false bills of sale listing Pinecrest Enterprises, Inc., as the seller in the nine transactions during the tax periods at issue, and the corresponding Florida reassignment documents listing Pinecrest Enterprises, Inc., as the selling dealer in these transactions, were forged.

8. After a review of all documentation collected during the investigation, the Division determined that New Gold Enterprises, Inc. was not a valid registered corporation and that petitioner was solely responsible for the collection and remittance of sales tax on the used motor vehicle transactions during the periods at issue and as such was liable for failure to collect and pay over the sales tax due under Articles 28 and 29 of the Tax Law on sales of motor vehicles during the periods at issue.

9. On October 21, 2002, petitioner was arrested and criminally charged with Grand Larceny in the Third Degree in violation of Penal Law § 155.35, a class D felony; Offering a False Instrument for Filing in the First Degree in violation of Penal Law § 175.35, a class E felony and the misdemeanor charge of Filing a False or Fraudulent Sales Tax Return in violation of Tax Law § 1817(b).

10. At the time of his arrest, the Division's Revenue Crimes Bureau investigator, Angelo Polito, notified petitioner's criminal defense attorney, Howard L. Jacobs, Esq., that penalties and interest would be assessed by the Division against petitioner after the resolution of the criminal action. Mr Jacobs represented Mr. Newman in the case of *People v. Newman* in the Criminal Court in the County of Albany. The Division's policy, which was followed in this case, is to have its Revenue Crimes Bureau investigators routinely inform defendants' criminal defense counsel that the criminal charges and the civil penalties and interest are separate actions against a defendant.

11. On April 24, 2003, before Hon. William A. Carter in Albany City Court, Criminal Part, petitioner entered a guilty plea to the charge of Petit Larceny in violation of Penal Law § 155.25, a class A misdemeanor, and a Judgment of Conviction was entered on September 2, 2003 convicting petitioner of the charge. In response to Judge Carter's question, "On June 11, 1999 during the regular business hours at the New York State Department of Taxation and Finance located here in the city of Albany, did you steal property consisting of \$23,266.63?" petitioner answered in the affirmative.

12. The plea agreement in the criminal action reached on April 24, 2003 between petitioner, petitioner's criminal defense counsel, Howard L. Jacobs, Esq., and Albany County Assistant District Attorney Mary Tanner-Richter stated that petitioner would agree to plead

guilty to Petit Larceny in violation of Penal Law § 155.25, pay \$23,266.63 restitution to be applied to the amount of sales tax determined to be due for the periods at issue, accept three years probation, serve 100 hours of community service and not participate in any transaction in which cars are bought and sold in Albany County.

13. On October 2, 2003, the Division issued to petitioner Notice of Determination L-022986159, asserting tax due of \$23,266.63, plus penalty and interest. The notice asserted a civil fraud penalty pursuant to Tax Law § 1145(a)(2). The notice reflected a payment of \$23,266.63 in tax paid by petitioner to the New York State Department of Taxation and Finance as part of the criminal action plea agreement for the tax periods ended August 31, 1999, November 30, 1999, May 31, 2000 and August 31, 2000.

14. A letter written by petitioner's criminal defense counsel, dated May 23, 2005, provided, in part, as follows:

Enclosed is the letter to the Assistant District Attorney resulting from the guilty plea, the agreement and confirmation of our understanding of the penalties and the term full restitution which should take into account all interest and penalties. We, at the time, assumed upon signing the agreement, the case was settled and in no way would we be called upon again to pay any additional amounts, whether criminally or civilly.

CONCLUSIONS OF LAW

A. The subject Notice of Determination assesses a civil fraud penalty pursuant to Tax Law § 1145(a)(2). The burden of showing that the failure to pay tax occurred as a result of fraud rests with the Division (*Matter of Ilter Sener*, Tax Appeals Tribunal, May 5, 1988). While fraud is not defined in the statute, a finding of fraud requires the Division to show:

clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing. (*Id.*, citing *Matter of Shutt*, State Tax Commn., July 13, 1982.)

For a taxpayer to be subject to a civil fraud penalty, willful intent is a critical element; the individual or the corporation, acting through its officers, must have acted deliberately, knowingly and with the specific intent to violate the Tax Law (*Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989).

B. The sales tax penalty provisions are modeled after the Federal penalty provisions and, thus, Federal statutes and case law may properly provide guidance in ascertaining whether the requisite intent for a showing of fraud has been established (*Matter of Uncle Jim's Donut and Dairy Store*, Tax Appeals Tribunal, October 5, 1989; *Matter of Ilter Sener, supra*). Since direct proof of a taxpayer's intent is rarely available, fraud may be proved by circumstantial evidence, including the taxpayer's course of conduct (*Intersimone v. Commissioner*, 53 TCM 1073; *Korecky v. Commissioner*, 781 F2d 1566). Relevant factors held to be significant include consistent and substantial understatement of tax, the amount of the deficiency itself, the existence of a pattern of repeated deficiencies and the taxpayer's entire course of conduct (*see, Merritt v. Commissioner*, 301 F2d 484; *Webb v. Commissioner*, 394 F2d 366; *Matter of AAA Sign Company*, Tax Appeals Tribunal, June 22, 1989). The issue of whether fraud with intent to evade payment of tax has been established presents a question of fact to be determined upon consideration of the entire record (*Matter of Sona Appliances, Inc.*, Tax Appeals Tribunal, March 16, 2000; *Matter of Drebin*, Tax Appeals Tribunal, March 27, 1997, *confirmed* 249 AD2d 716, 671 NYS2d 565).

C. The Division has clearly established that petitioner's failure to pay tax occurred as a result of fraud. Petitioner pled guilty to Petit Larceny, a misdemeanor, in violation of Penal Law § 155.25. His plea of guilty was predicated on his admission that he stole property of the

Division in the amount of \$23,266.63, based upon his failure to pay over sales tax to New York State which he had collected from his customers. The crime of petit larceny requires the intent to deprive an owner of his property (*People v. Schmid*, 124 AD2d 896, 508 NYS2d 314). In addition, petitioner answered affirmatively during his allocution that he stole property consisting of \$23,266.63 from New York State. Petitioner created an elaborate scheme to deprive the State of sales tax funds, which included duplicate bills of sale for used motor vehicles he sold to individuals, false documentation from an unrelated automobile dealership in Florida which petitioner was not authorized to represent in transactions in New York, false bills of sale to individuals, false State of Florida motor vehicle dealer title reassignments which petitioner submitted to DMV and false bills of sale containing fictitious trade-in vehicles from Pinecrest Enterprises, Inc. The Statement of Transaction - Sale of Motor Vehicle forms submitted by petitioner in each of the nine motor vehicle transactions listed false total purchase prices for the vehicles and underreported the correct sales tax due on each transaction. The maintenance and submission of records known to be false is clear evidence of fraud (*Korecky v. Commissioner, supra*). The duplicate bills of sale created by petitioner for each of the transactions at issue herein which provided support for the false sales tax returns filed which underreported the actual sales tax due on the transactions establish that petitioner knowingly and intentionally collected but did not remit sales taxes due during the periods of issue. Here, petitioner, in his capacity as a fiduciary, collected sales tax from individuals and then failed to remit the entire amount collected to New York State, thereby depriving the State of its tax revenue.

Petitioner's guilty plea to petit larceny as a result of his failure to remit sales tax, his admission of taking sales tax money, his filing of false and forged documents, his creation of an elaborate scheme to steal sales tax money and the substantial underreporting of sales tax due

clearly establish a willful intent to deprive the State of its property (*Matter of Altieri*, Tax Appeals Tribunal, August 20, 1998).

D. Petitioner asserts that the amount of the restitution agreed to as part of his plea agreement in the criminal case was in full satisfaction of any civil liability. As part of his plea agreement, Mr. Newman paid restitution in the amount of \$23,266.63.

The Division is not restricted as a matter of law from issuing a Notice of Determination for the total amount of taxes it determined was due, where that amount is greater than an amount agreed to as restitution in a criminal case based on the same facts for the same time period (*see*, Penal Law § 60.27[6]; *Farber v. Stockton*, 131 Misc 2d 470, 502 NYS2d 901; *Matter of N.T.J. Liquors*, Tax Appeals Tribunal, May 7, 1992). Since the notice was properly issued by the Division, it is petitioner's burden of proof to show that, based on the plea agreement, the amount set forth in the notice is erroneous because of some promise made by the prosecutor that Mr. Newman relied upon to his detriment (*see*, *Matter of Miras*, Tax Appeals Tribunal, October 22, 1992; *Matter of N.T.J. Liquors*, *supra*). While the Division might not legally be bound to the terms of a plea agreement arrived at between a defendant and a prosecutor,

an earlier promise made by a prosecutor, an agent of the State, must be treated as a highly significant factor when the State agency with the power to enforce the promise is called upon to do so. The mere fact that an agent of the State made a representation to a criminal defendant and the defendant then pleaded guilty, assertedly in reliance on the representation, is entitled to weight (*Matter of Chaipis v. State Liq. Auth.*, 44 NY2d 57, 404 NYS2d 76, 80).

E. Petitioner has failed to establish that any promises were made to him as part of the plea agreement in the criminal matter that no further civil liabilities would be assessed. During his testimony, petitioner never asserted that the prosecutor made specific promises or statements that the restitution paid in the criminal matter would satisfy the civil liability for penalty and

interest. The letter of Mr. Harold L. Jacobs, Esq., petitioner's criminal defense counsel, is insufficient to meet petitioner's burden of proof. Mr. Jacobs did not testify at the hearing as to his understanding of the circumstances surrounding the plea agreement. Furthermore, there is nothing in the record that substantiates Mr. Jacobs's assumption that the plea agreement satisfied both the criminal and civil matters, and it is contradicted by the credible testimony of the Division's witness that he expressly informed petitioner and his criminal counsel that penalties and interest would be assessed against petitioner once the criminal matter was concluded.

It is determined that Mr. Newman has failed to prove that any promises were made to him as part of the plea agreement to the effect that no further civil liabilities would be assessed. Petitioner offered no credible proof to establish that there was any type of agreement to limit his sales tax liability to the amount of restitution paid as part of the plea arrangement. Therefore, the Division was not limited to the amount of restitution set forth in the plea proceedings (*see, Matter of Sona Appliances, Inc., supra; Matter of Miras, supra; Matter of N.T.J. Liquors, supra; Matter of Dallacqua*, Tax Appeals Tribunal, March 2, 1989).

F. The petition of Alan Newman is denied, and the Notice of Determination issued on October 3, 2003 is sustained.

DATED: Troy, New York
May 18, 2006

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE